Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

Stephen P. Sherwood
Sharon L. Sherwood

Petitioners

v.

Commissioner of Internal Revenue

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals violated the appellants' right to due process under the 5th Amendment.

II. Whether the Commissioner of Internal Revenue made a valid determination of deficiency in relation to the Sherwoods. Absent a valid notice of deficiency, did the Tax Court lack jurisdiction in this case.

III. Whether the Special Trial Judge had authority to hear the case before the Tax Court.

IV. Whether the Tax Court abused its discretion in assessing penalties sua sponte against the Sherwoods for bringing a frivolous case.

V. Whether the assessment of penalties against the Sherwoods by the Tax Court and the Court of Appeals constitutes an infringement of their right to petition their government for a redress of grievances.

LIST OF PARTIES

Stephen P. Sherwood, Petitioner, pro se
Sharon L. Sherwood, Petitioner, pro se
Commissioner of Internal Revenue, Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States Tax Court appears at Appendix B to the petition and is unpublished.

The decision of the United States Tax Court appears at Appendix C to the petition.

JURISDICTION

This case was decided in the United States Court of Appeals on February 26, 1998.

No petition for rehearing was timely filed in this case.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. U. S. Constitution, Articles of Amendment, Article I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. U. S. Constitution, Articles of Amendment, Article V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTERNAL REVENUE CODE SECTIONS

61 **Gross income defined.**

(a) General definition.

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;

(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

6211 **Definition of a deficiency.**

(a) In general.

For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44, the term 'deficiency' means the amount by which the tax imposed by subtitle A or B or chapter 41, 42, 43, and 44, exceeds the excess of —

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over —

(2) the amount of rebates, as defined in subsection (b)(2), made.

6651 **Failure to file tax return or to pay tax.**

(a) Failure to file tax return or to pay tax.

In case of failure —

(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;

(2) to pay the amount shown as tax on any return specified in paragraph (1) on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate; or

(3) to pay any amount in respect of any tax required to be shown on a return specified in paragraph (1) which is not so shown (including an assessment made pursuant to section 6213(b)) within 10 days of the date of the notice and demand therefor, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

In the case of a failure to file a return of tax imposed by chapter1 within 60 days of the date prescribed for filing of such return (determined with regard to any extensions of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, the addition to tax under paragraph (1) shall not be less than the lesser of $100 or 100 percent of the amount required to be shown as tax on such return.

(f) **Increase in penalty for fraudulent failure to file.**

If any failure to file any return is fraudulent, paragraph (1) of subsection (a) shall be applied —

(1) by substituting '15 percent' for '5 percent' each place it appears, and

(2) by substituting '75 percent' for '25 percent'.

6662 **Imposition of accuracy-related penalty**.

(a) Imposition of penalty.

If this section applies to any portion of an underpayment of tax required to be shown on a return, there shall be added to the tax an amount equal to 20 percent of the portion of the underpayment to which this section applies.

(b) Portion of underpayment to which section applies.

(1) Negligence or disregard of rules or regulations.

(c) Negligence.

For purposes of this section, the term "negligence" includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term "disregard" includes any careless, reckless, or intentional disregard.

6663. Imposition of fraud penalty.

(a) Imposition of penalty.

If any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax and amount equal to 75 percent of the portion of the underpayment which is attributable to fraud.

6673. Sanctions and costs awarded by courts.

(a) Tax court proceedings

(1) Procedures instituted primarily for delay, etc.

(B) the taxpayer's position in such proceeding is frivolous or groundless, or

7443A. Special trial judges.

(b) Proceedings which may be assigned to special trial judges.

(2) any proceeding where neither the amount of the deficiency placed in dispute (within the meaning of section 7463) nor the amount of any claimed overpayment exceeds $10,000, and

7463. Disputes involving $10,000 or less.

(e) Amount of deficiency in dispute.

For purposes of this section, the amount of any deficiency placed in dispute includes additions to the tax, additional amounts, and penalties imposed by chapter 68, to the extent that the procedures described in subchapter B of chapter 63 apply.

26 C.F.R. 1.1-1(c) *Who is a citizen.*

Every person born or naturalized in the United States and subject to its jurisdiction is a citizen. For other rules governing the acquisition of citizenship, see chapters 1 and 2 of title III of the

Immigration and Nationality Act (8 U.S.C. 1401-1459). For rules governing loss of citizenship, see sections 349 to 357, inclusive, of such Act (8 U.S.C. 1401-1459), Schneider v. Rusk, (1964) 377 U.S. 163, and Rev. Rul. 70-506, C.B. 1970-2, I. For rules pertaining to persons who are nationals but not citizens at birth, e.g., a person born in American Samoa, see section 308 of such Act (8 U.S.C. 1408). For special rules applicable to certain expatriates who have lost citizenship with a principal purpose of avoiding certain taxes, see section 877. A foreigner who has filed his declaration of intention of becoming a citizen but who has not yet been admitted to citizenship by a final order of a naturalization court is an alien.

Federal Rules of Appellate Procedure
Rule 38

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts below.

On May 31, 1995, the Commissioner of Internal Revenue sent separate Notices of Deficiency to Stephen P. and Sharon L. Sherwood. The Commissioner asserted deficiencies in taxes and penalties under 26 U.S.C. 6651 and civil fraud penalties under 26 U.S.C. 6663(a) for the years 1991, 1992 and 1993. The deficiencies and additions to tax asserted by the Commissioner were in the amounts of $16,704 for 1991, $11,654 for 1992 and $9,662 for 1993. On August 24, 1995, the Sherwoods petitioned the Tax Court for a redetermination of the deficiencies asserted by the Commissioner.

On May 6, 1996, at a hearing in San Antonio, Texas, the Petitioners requested that their case be removed from the "small tax case" (type S) designation and tried as a regular tax case.

They also requested that, although separate notices of deficiency had been issued, their case be tried as a single case. The Tax Court granted the Sherwoods' requests and so ordered. On May 10, 1996 the Sherwoods filed a motion to dismiss for lack of jurisdiction which was denied by the Tax Court.

On January 15, 1997, the Tax Court filed a memorandum opinion, *T.C. Memo 1997-26*, which held in favor of the Commissioner on the deficiencies in taxes and additions to tax under 26 U.S.C. 6651(a) and held in favor of the Petitioners with regard to the civil fraud penalties under 26 U.S.C. 6651(f) and 26 U.S.C. 6663(a). The Tax Court held the Sherwoods liable for penalties under 26 U.S.C. 6662(a), holding that the Sherwoods failed to make a reasonable attempt to comply with the Internal Revenue laws. In addition, the Tax Court, sua sponte, assessed the Sherwoods a $2,500 penalty each under 26 U.S.C. 6673(a)(1)(B).

On July 9, 1997, the Sherwoods timely appealed the Tax Court's decision to the United States Court of Appeals For the Fifth Circuit.

On February 26, 1998, the Court of Appeals filed its decision without hearing oral argument in which it affirmed the Tax Court's decision and ordered the Sherwoods to show cause within 10 days why double costs and attorneys' fees should not be awarded to the IRS as damages under FRAP Rule 38.

The Sherwoods timely petitioned this Court to review their case within the time prescribed by Rule 13 of the Rules of the Supreme Court of the United States.

B. Statement of facts

Mr. And Mrs. Sherwood were engaged in a discussion with a friend in the fall of 1991. During the course of that discussion, their friend challenged some very widely held beliefs. He maintained that it is because these beliefs are so widespread that they remain largely unchallenged. He suggested that the Sherwoods impartially read the material for themselves as though they had no previous knowledge and no one to ask in order to learn the truth. While the Sherwoods were more than slightly skeptical, they decided to give their friend the benefit of the doubt

and investigate further. When their friend's allegations were researched, the Sherwoods became increasingly convinced that the beliefs that they had shared with so many others all of their lives were untrue. What they found left them somewhat shaken, but the evidence was incontrovertible and is available for anyone to read. Some of the conclusions that they reached and the evidence behind those conclusions are contained in this petition and in the record of this case. The Sherwoods respectfully pray that this Court will accept the same challenge.

1. The IRS accepts the Sherwoods' 1991 tax returns.

On June 12, 1992, the Sherwoods each timely filed individual income tax returns, Forms 1040NR, with the IRS center in Philadelphia, with Forms W-2 properly attached. The returns were processed, and on June 26, 1992, the Chief of the Entity Control Section acknowledged the Sherwoods' new filing status and issued them IRSN's. On July 24, 1992 a refund was issued to Mr. Sherwood in the amount of $8,962.72. Were the Sherwoods surprised to receive a refund of nearly all their federal income tax? Yes, they were. But since the return had been scrutinized by a department known as the "Entity Control Section," they were further convinced that their conclusions had been correct.

2. The IRS rejects the Sherwoods' similar 1992 tax returns.

On April 8, 1993, Mr. Sherwood timely filed individual income tax return, Form 1040NR for 1992, with the IRS center in Philadelphia. Mrs. Sherwood was not required to file a return for that year and did not.

On June 30, 1994, the IRS in Bensalem, Pennsylvania sent a threatening letter to Mr. Sherwood stating that they had not received a reply to their request for information about Mr. Sherwood's 1992 tax return. Mr. Sherwood had received no such request. He replied and enclosed a copy of his 1992 return.

In early July, 1994, the IRS center in Austin, Texas sent a letter to Mr. Sherwood rejecting his 1992 return. The rejection stated only that the document Mr. Sherwood filed "is not acceptable as an individual income tax return. It does not contain the information required by Title 26 of the United States Code (Internal Revenue Code), nor does it comply with the Income Tax Regulations". Although the letter seemed to indicate that the

Commissioner thought that the Sherwoods had made a mistake in filing their return, the letter did not state *which* information was missing or *where* in the nearly 10,000 pages of Title 26 was the requirement for that information stated or with *which* of the thousands of Income Tax Regulations it did not comply. So, in case they had made an error, the Sherwoods politely requested clarification. The Commissioner did not respond.

Nothing further was heard from the IRS by the Sherwoods in regard to their 1992 returns until a telephone conversation on January 19, 1995 in which the IRS again requested a copy of Mr. Sherwood's 1992 tax return, this time to be sent to the Austin, Texas office. Mr. Sherwood complied.

3. The IRS demands an audit of the Sherwoods' books and records.

On December 23, 1995, Mr. Sherwood received a letter from the IRS demanding an audit of his books and records for 1991 and referencing his Form 1040NR. The letter set a meeting on January 25, 1996. Mr. Sherwood requested an extension, and the meeting was rescheduled for March 2, 1996. On January 3, 1996, the Sherwoods filed Freedom of Information Act requests to obtain their IRS master files for previous years to help them prepare for the March 2nd meeting.

On February 13, 1996, the Sherwoods had still not received the requested information from the IRS Information Officer. Mr. Sherwood telephoned the IRS agent to request that their meeting scheduled for March 2nd be deferred until some time after the information they had requested from the IRS was received. The agent said that she could only grant that request if the Sherwoods would sign an agreement to extend the statute of limitations. The Sherwoods refused. The agent volunteered to provide the requested information herself if the Sherwoods would come to her office to pick it up.

On February 16, 1996, the Sherwoods went to the IRS agent's office to pick up the copies of their master files as the revenue agent had promised. The agent refused to provide that information and, instead, tried to engage the Sherwoods in a discussion of their case. The Sherwoods refused to comment pending receipt of the files they had requested from the IRS. The

agent stated that if the Sherwoods did not meet with her on March 2, 1996, she would issue a 90 day statutory notice.

On February 17, 1996 Mr. Sherwood received another audit notice from the same agent, this time for 1992 and 1993 and again setting a meeting for March 2, 1996. This time the letter referenced Form 1040, not the Form 1040NR which he had filed. Mr. Sherwood again requested in writing that the meeting be rescheduled pending receipt of the records he had requested from the IRS. The IRS agent did not respond.

On February 24, 1996, Mrs. Sherwood received a notice of audit for 1991, 1992 and 1993 from the same revenue agent demanding a meeting on March 2, 1996. The letter cited Form 1040NR for 1991 and Form 1040 for 1992 and 1993. Mrs. Sherwood responded with a request to defer the meeting until after her FOIA request had been processed. The IRS agent did not respond.

4. The IRS sends Notices of Deficiency.

On May 31, 1995, just two weeks prior to the expiration of the statute of limitations for the 1991 tax year, the Commissioner sent Notices of Deficiency to Mr. and Mrs. Sherwood for the years 1991, 1992 and 1993. The notices asserted deficiencies of $4,718, $5,419 and $4707 for Mr. Sherwood for 1991, 1992 and 1993, respectively. Deficiencies were asserted for Mrs. Sherwood in the amounts of $4,713, $5,394 and $4,707 for 1991, 1992 and 1993, respectively. The notices further asserted a penalty of $100 each under 26 U.S.C. 6651(a)(1) in 1991 and penalties under 26 U.S.C. 6651(f) of $124 each for 1993 and $430 and $411 respectively for Mr. and Mrs. Sherwood for 1992. The Commissioner also asserted civil fraud penalties under 26 U.S.C. 6663(a) for 1991 in the amounts of $3,538 and $3,535.

5. The Sherwoods petition the Tax Court for a redetermination of deficiency.

Since they lacked the funds to pay the alleged deficiency and sue to recover it in federal district court, the Sherwoods petitioned the Tax Court for a redetermination of deficiency. An error of omission on the Petition form that the Sherwoods received from the Tax Court caused the case to be docketed as a type "S"

case. (That error was corrected by the Tax Court at the request of the Sherwoods on April 6, 1997.)

During pre-trial proceedings, the Sherwoods again attempted to ascertain the substantive basis for the Commissioner's position stated in the notices of deficiency by submitting informal interrogatories to counsel for the Commissioner. No written response to their interrogatories was provided. Counsel for the Commissioner's only reply to any of the questions presented therein was during a conference with the Sherwoods in his office in which he stated that section 61 of the Internal Revenue Code mandates the tax liability on them and requires them to file forms 1040.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals violated the Sherwoods' right to due process under the 5th Amendment.

The Court of Appeals misstated the Sherwoods' position in its decision in order to make the Sherwoods' case appear frivolous. The opinion states that

> "After a thorough review of the record and a close study of the briefs, we conclude that the Sherwoods' arguments are all without merit. Indeed, they are frivolous.
>
> The Sherwoods' jurisdictional complaint and most of their argument on the merits are tied to a belief that they are citizens of the State of Texas, not the United States. For this reason, they conclude that they are (1) not subject to most taxes and (2) permitted to file Form 1040-NR. As there is obviously no validity to the Sherwoods' concept of citizenship, the arguments based upon it are frivolous."

Were this not the ruling of the United States Court of Appeals, the Court might just as well have written "Form 1040-NR?! Now, really! Who are you kidding?" The Court makes two egregious errors in this statement which make it clear, however, that it did not make a close study of the briefs. Perhaps the Court

is a victim of one of the widely held *misconceptions* mentioned earlier: that there is only one kind of citizen of the United States, and a person either is or is not. The Sherwoods have never argued that they are not Citizens of the United States. Such an argument would, indeed, be either frivolous or ignorant. Rather, their contention is that they ARE Citizens of the United States BECAUSE they are citizens of the States of Texas and Wisconsin, respectively. They assert that they are not citizens of the United States by virtue of the Fourteenth Amendment. If the Fourteenth Amendment did not exist, they would still be Citizens of the United States.

While in recent history the Fourteenth Amendment has been the basis of numerous decisions by this Court, most of those did not revolve around citizenship. However, as we are sure the Court is aware, granting citizenship to former slaves was the primary purpose for its adoption and ratification in 1868. The Sherwoods' cited two cases in their briefs: Slaughterhouse Cases, 16 Wall 36, 83 U.S. 395, 408 (1873) and United States v. Wong Kim Ark, 18 Sup. Ct. 456 (1898). The language of the Supreme Court in those cases refers to the terms "citizenship of a state" and "citizenship of the United States" to illustrate the distinction between the two classes of citizens of the United States: those who get their citizenship by virtue of being born a citizen of a State, and those who obtain their citizenship directly from the Fourteenth Amendment. The Sherwoods have always only maintained that they belong to the former class and not the latter and cited those cases so that their meaning would be clear. Had the Court of Appeals truly made a close study of the briefs, "the Sherwoods' concept of citizenship" would have been clear to the Court.

The question of citizenship was only raised so that the Tax Court could determine whether the Sherwoods were subject to penalties for fraud. Indeed, the Tax Court ruled that the Sherwoods were NOT subject to such penalties.

Whether the Sherwoods were "permitted" to file Form 1040-NR was never a question before the Court of Appeals. The Commissioner had accepted the Sherwoods' returns filed on Forms 1040-NR for 1991 and never refuted either her acceptance or the validity of those forms with any substantive argument. The Tax Court noted this fact in its decision (see quote p. 18). The

Sherwoods' claim that the Tax Court lacked jurisdiction is based on their assertion that the notices of deficiency prepared by the Commissioner were and are invalid, leaving nothing on which the Tax Court's jurisdiction can rest, and that the Special Trial Judge lacked authority to hear the case. The question of citizenship has nothing whatever to do with the Sherwoods' arguments concerning the Tax Court's jurisdiction.

It is the function of the Judiciary to impartially decide cases based on the law, the facts and the arguments of the parties involved. While it might be expected of the Commissioner's counsel to attempt in his defense to make the Sherwoods' arguments look like frivolous arguments put forth by others in the past, it is unconscionable for the Court to do so. And, while the Court of Appeals might not like the facts in this case, it erred in distorting them in order to avoid ruling on the substantive issues of the case and to allow it to make a ruling it found palatable. Such a distortion is a clear violation of the Sherwoods' right to due process guaranteed by the Fifth Amendment.

The Court seems to have been the victim of the second commonly held *misconception*: that when the IRS applies the label of "tax protester" to someone, it must be true. Had the Sherwoods in their appeal to the Court of Appeals labelled the Tax Court judge a "pompous windbag" or called him stupid as he did the Sherwoods in his opinion, would the Court of Appeals have looked more favorably on their arguments or sought more diligently for flaws in the Tax Court's decision? Decidedly not. Yet it would appear that the assertion by the Commissioner that the Sherwoods are "tax protesters," a label used with the intention of conjuring up the image of bib-overall-wearin', musket-totin', unwashed, illiterate cretins or of lunatic-fringe, heretical zealots, although absolutely untrue, was effective in biasing the Court of Appeals as well as the Tax Court against the Sherwoods.

The obvious misstatement of the Sherwoods' arguments is clear evidence of the bias responsible for the Court's denial of the Sherwoods' right to due process, i.e., to have the merits of their case considered impartially.

While Americans, sadly, have come to expect abuse from the IRS, they do not expect it from the Judiciary. If the attachment of the label "tax protester" to the Sherwoods by either

the IRS or an administrative court can so bias the rest of the Judiciary that the Judiciary acts as a mere "rubber stamp" of approval for the IRS, then this injustice can and will happen again and again to others who seek only to defend their rights against an abusive agency of the federal government - rights the Judiciary is sworn to defend.

II. The Commissioner of Internal Revenue did not make a valid determination of deficiency in relation to the Sherwoods. Absent a valid notice of deficiency, the Tax Court lacked jurisdiction in this case.

Neither of the lower Courts has ruled on this issue. The Commissioner did not make a valid determination of deficiency with regard to the Sherwoods because she ignored the returns filed by the Sherwoods which she had accepted as valid in making that "determination." 26 U.S.C. 6211(a) defines "deficiency" as the amount by which tax due exceeds "the amount shown as the tax by the taxpayer upon his return." The returns accepted by the Commissioner as valid filings and the statutes and regulations which apply to such returns should have been used in her determination of a deficiency but were not.

In the Sherwoods' case, even though it might appear on the surface that the IRS made a mistake in accepting the Sherwoods' 1991 returns, (widely held *misconception* number three: "everyone knows" you must file Form 1040 and pay income tax) the Commissioner could not and did not refute the validity of those returns. The Commissioner did, in fact, make a mistake by hastily preparing notices of deficiency which completely disregarded the Sherwoods' returns in order to avoid the expiration of the statute of limitations. Nor has she produced any substantive evidence of law or fact at any time during these proceedings which support her refusal to accept similar returns for 1992 and 1993.

The Commissioner's "legal basis" for asserting that the Sherwoods were liable to file Forms 1040 for 1992 and 1993 has been

1. "you filed Form 1040 before, so you know you have an obligation."

2. Section 61 of the Internal Revenue Code mandates that you file Form 1040. (more on this later)

Do either of these arguments provide substantive evidence of a legal obligation? Clearly not. What mandates a liability is a statute and an enforcing regulation. What form to file is spelled out in a regulation. An administrative agency requiring a form must publish which regulation pertains to that form. The form must bear a number assigned by the Office of Management and Budget. All this is per the Paperwork Reduction Act of 1980 which applies to every government agency. Has the Commissioner provided the basis for the Sherwoods' alleged obligation? No.

Furthermore, the Commissioner has not at any time brought forth evidence that the Form 1040NR filed by the Sherwoods was in any way unacceptable. Simply preparing a notice of deficiency is not proof of a liability. Both the law and the facts in this case indicate that the notices of deficiency prepared by the Commissioner were invalid and that the Tax Court lacked jurisdiction. See Scar v. Commissioner, 814 F.2d 1363 (9th Cir. 1987). This Court should rule on this issue because this case, while it is similar to *Scar*, differs in that, in *Scar*, the Commissioner admitted it did not have the taxpayers' return, whereas in this case, the Commissioner had the return but ignored it. The Ninth Circuit had the courage to rule on the law. The Fifth Circuit apparently did not see the similarity between these cases which we believe is evident.

Okay, so now you may be saying to yourself, "this is pretty far fetched. They filed a bogus form, the IRS accepted it by accident, and now they are insisting that these people pay up like everybody else. Where do these people get off?" It certainly seems that is what the lower courts thought. If I were addressing a board of directors, here is where I would say, "Stay with me here. Think outside the box," meaning don't be afraid to question the conventional wisdom. Remember, the world was once flat.

Indeed, it may appear that the Sherwoods are grasping at straws in order to avoid paying their taxes. Nothing could be farther from the truth. If the Form 1040-NR filed by the Sherwoods is somehow wrong, why hasn't the Commissioner simply provided a reason? If the Sherwoods have a legal

obligation for a tax liability, supported by the statutes and regulations, with a form properly promulgated and approved by the Office of Management and Budget on which to make a return, then why hasn't the IRS simply provided that information? Wouldn't that make their job of collection easier? The Tax Court claimed that the IRS doesn't have to educate the public, and we agree that that is not their purpose. But if the IRS asserts that a taxpayer has a liability, are they not obligated to support their claim? And if the IRS is not obligated to substantiate a liability it alleges on a taxpayer, and we pray that is not the case, at least the Courts should be able to cite the proper statutory and regulatory authority for that liability on their behalf. Had the liability which the IRS claims accrues to the Sherwoods been supported by proper authority, the Sherwoods would happily have changed their position. BUT NEITHER THE IRS NOR THE LOWER COURTS SUBSTANTIATED THE SHERWOODS' LIABILITY.

When the Court of Appeals affirmed the ruling of the Tax Court that the deficiencies were properly determined, it opened the door for widespread abuse of taxpayers' rights. By ruling that the IRS did not have to justify its use of forms, statutes and regulations relating to the form filed by the taxpayer and accepted by the Commissioner in determining a deficiency, and that a liability against a taxpayer may be asserted without statutory or regulatory authority, it affirmed that the IRS can assess any deficiency or penalty against a taxpayer regardless of the law that pertains to that particular taxpayer.

If allowed to stand, this ruling is analogous to the Court affirming that when taxpayer John Smith files a form 1040 which the IRS accepts, the IRS can subsequently determine that John Smith did not pay sufficient tax because the laws pertaining to corporations, partnerships, foreign trusts, firearms retailers, manufacturers of alcoholic beverages, taxicab drivers, foreign nationals... or statutes and regulations pertaining to any other entity can be used to "determine" his "deficiency" at the whim of the IRS. While the Sherwoods are certain that the IRS would like for this to be the case, they assert that the IRS is, in fact, bound by appropriate law as it relates to each particular taxpayer.

The Tax Court should have dismissed for lack of jurisdiction.

III. The Special Trial Judge lacked authority to hear the case before the Tax Court.

The Court of Appeals did not rule on this issue. The amounts in dispute for 1991 and 1992 exceeded $10,000 for this joint case. The tax which the Commissioner claimed was deficient for all three years, and consequently, the additions to tax were based solely on the activities of only Mr. Sherwood. Because the Tax Court allowed this to proceed as a joint proceeding, and because the division of the deficiency by the Commissioner was a fiction based on a "community property" argument, the Commissioner argues that the amounts in dispute were less than the $10,000 that a Special Trial Judge may adjudicate. Through that line of reasoning, the amount each of them owes is their share of a "community property" liability which means that the liability belongs in total to both of them. At this writing, the IRS has filed a levy against the Sherwoods' joint checking account in Mrs. Sherwood's name, even though she is a homemaker and has not produced any of the money which the IRS claims she owes. Certainly the IRS views the alleged deficiency as a single debt. The amounts in dispute constitute a single sum for both Mr. And Mrs. Sherwood, and for the individual years, the amounts were $16,704 for 1991 and $11,654 for 1992, which amounts exceed the amount that may be adjudicated by a Special Trial Judge per 26 U.S.C. 7443A(b)(3) and 26 U.S.C. 7463(e).. Consequently, the Special Trial Judge lacked authority to hear the case.

The Court of Appeals should have dismissed for lack of jurisdiction. Instead it refused to rule on this issue (see argument I. Above).

IV. The Tax Court abused its discretion in assessing penalties sua sponte against the Sherwoods for bringing a frivolous case and in sustaining penalties asserted by the Commissioner for negligence, and the Court of Appeals erred in affirming.

The Tax Court claimed that the Sherwoods' position in bringing their case was frivolous pursuant to 26 U.S.C. 6673(a)(1)(b). In her notices of deficiency, the Commissioner asserted penalties for civil fraud against the Sherwoods. She also held an unexplained contradictory position with regard to their filing status. The Sherwoods petitioned the Tax Court to address these issues. Had they not done so, they would have tacitly admitted to fraud and been saddled with an unjust penalty of over $7,000.

The Tax Court admitted in its memorandum opinion that the Commissioner's position was contradictory:

> "Irrespective of the fact that respondent has taken an inconsistent position with regard to petitioners' Forms 1040-NR" and, in explanation at footnote 2, "For 1991, respondent accepted petitioners Forms 1040-NR as a filing of a return."
>
> and further,
>
> "We note that respondent accepted these forms as a valid filing and continues to rely upon such acceptance..."

The Tax Court further ruled that there was no basis for the civil fraud penalties, so the Sherwoods were granted the relief they sought.

The Tax Court then assessed a penalty of $5,000 against the Sherwoods under 26 U.S.C. 6673(a)(1)(B). This statute is captioned "Procedures instituted primarily for delay, etc." The Sherwoods did not bring action to waste the Court's time. They brought action to defend themselves against an accusation by the IRS, to get the penalties for fraud reversed, and to get resolution on the Commissioner's conflicted position. And, although the Tax Court admitted the Commissioner's position was contradictory, it did nothing to dispel the confusion. The Tax Court stated that the Sherwoods' case was frivolous because it is "contrary to established law." To which established law is the Sherwoods' position contrary? Perhaps one of the widely held misconceptions? It is for this Court to decide.

Then the Tax Court assessed a penalty of approximately $2,000 due to negligence or disregard of rules or regulations per 26 U.S.C. 6662(b)(1). The Sherwoods read and attempted to

understand the Internal Revenue Code. Title 26 of the United States Code contains hundreds of distinct types of taxes and is nearly 10,000 pages in length. The Sherwoods attempted to understand which of those statutes and their corresponding regulations pertained to them. In addition to their study, since much of the Internal Revenue Code is less than intuitively obvious, they sent numerous requests to the IRS for clarification of exactly which laws and regulations applied to them, especially when the IRS asserted that they had a liability. The IRS never responded to any of their requests. The Sherwoods cited some of their research in their brief to the Tax Court in an effort to illustrate that the lengths to which they went were to understand and comply with the law and regulations rather than to defraud the IRS.

Furthermore, the Tax Court stated that it was not the job of the IRS to hold legal seminars for the public, but it did not rule on whether the IRS is required to substantiate a claim against an individual with appropriate statutory and regulatory authority. While it is the taxpayer who bears the burden of proof that he does not owe a tax, it is impossible to provide such proof absent an assertion of *which particular tax* the Commissioner claims the taxpayer owes. The Commissioner has not produced statutory or regulatory authority at any point in these proceedings against which the Sherwoods might offer such proof.

Prior to bringing their appeal to the Court of Appeals, the Commissioner's only statutory reference to the Sherwoods' liability was 26 U.S.C. 61. Finally, apparently realizing that providing some authority for her position might be needed, the Commissioner argues to the Court of Appeals on brief, that the power to tax wages and other income derives from Article I, Section 8 of the Constitution and the Sixteenth Amendment to the Constitution, citing Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 12 (1916) in support, and stating that the Sherwoods' argument that their wages are not subject to tax is one of personal protest. On the contrary, the Sherwoods have never contested those authorities nor protested them. They agree that the Brushaber decision is the definitive case upholding the Constitutionality of both the Sixteenth Amendment and the income tax. In fact, the Brushaber decision supports their

contention that the definition put forth in 26 C.F.R. 1.1-1(c) applies only to "Fourteenth Amendment" citizens.

Now for commonly held *misconception* number four: the Sixteenth Amendment allows Congress to levy a direct, unapportioned tax on income. The Sherwoods were stunned to learn that the Brushaber Court clearly stated that any tax on income is an *excise* tax. What the Brushaber Court affirmed was that the Sixteenth Amendment did not confer on Congress any new taxing authority (that of a direct, unapportioned tax on income):

> "We are of the opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far reaching effect of this *erroneous assumption*... [emphasis added]" (id. p. 499).

Further, citing Pollock v. Farmers' Loan & T. Co., 157 U.S. 429, the Brushaber court restated that such a direct, unapportioned tax

> "'...would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on *capital* would remain, in substance, a tax on occupations and labor' (id. p. 637) -- a result which, it was held, could not have been contemplated by Congress."

The Brushaber court further stated that

> "...the purpose [of the 16th Amendment] was not to change the existing interpretation..., and thereby *to take an income tax out of the class of excises, duties, and imposts,* and place it in the class of direct taxes." [emphasis added]

In its ruling, the Court thus firmly established the income tax as an *excise tax*. And, while this may be heresy in that it contradicts commonly held beliefs, it is, nonetheless the truth and

there for all to see. The Sherwoods found this truth in the distinguished halls of the University of Texas Law Library.

Earlier, the Supreme Court ruled:

> "Excises are a species of taxes, consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them." Pollock v. Farmers' Loan & T. Co., 157 U.S. 429 (1896).

Again, the Supreme Court ruled that excise taxes are:

> "...taxes laid on the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations and upon corporate privileges; the requirement to pay such taxes involves the exercise of the privilege and if business is not done in the manner described no tax is payable...it is the privilege which is the subject of the tax and not the mere buying, selling or handling of goods." Flint v. Stone Tracy Co. 220 U.S. 107 (1911).

> "A privilege is the exercise of an occupation or business which requires a license from some proper authority designated by a general law and not open to all or any one without such license." Jenkins v. Ewin, 8 Heisk. 456, 475.

> "Since the right to receive income or earnings is a right belonging to every person, this right cannot be taxed as a privilege." Jack Cole Co. v. MacFarland 337 S.W.2d. 453, 456 (1960).

Clearly, then, wages and income *are* taxable when obtained from some privileged occupation, trade or business. A citizen who receives his or her citizenship directly from the federal government of the United States via the Fourteenth Amendment indeed receives a privilege; and, therefore, an excise tax upon his or her wages is duly authorized. Additional categories to which an

excise on income might apply are officers of corporations, federal employees, etc. The Sherwoods, however, receive no privilege from the Fourteenth Amendment and engaged in no privileged activity during the years in question, before or since. Mr. Sherwood was engaged in an occupation of common right as a systems analyst. Mrs. Sherwood is a homemaker, also an occupation of common right. The Sherwoods' argument is not that "wages are not income," but rather that *their* wages are not income subject to an *excise* tax.

The Commissioner has asserted by citing the Brushaber decision that the Sherwoods are subject to an excise tax, yet she has refused to state what statute and regulation cause Mr. Sherwood's wages to be subject to such a tax, and for what specific excise tax is he liable. Her contention that 26 U.S.C. 61(a) mandates a liability on them is without merit. That section of the Internal Revenue Code simply defines gross income. Where then is the liability imposed on the Sherwoods? And what is the corresponding implementing regulation? The Sherwoods have requested this information numerous times and received no reply. The Commissioner has only stated that the Sherwoods have taken a frivolous position, but has provided absolutely no statutory or regulatory basis for that assertion. She has put forth no argument in opposition to the Sherwoods' conclusion that 26 C.F.R. 1.1-1(c) describes only 14th Amendment citizens. All of the Commissioner's arguments are made *ipse dixit*.

Okay, here's where it gets tricky. You are probably thinking right now, "Hold the phone! Are these people actually asking the Supreme Court of the United States to rule that the millions of American citizens who ante-up a third of their hard-earned money every April 15th don't really have to?!?" Thankfully, that is not the issue to be decided here. What the Sherwoods are asking the Supreme Court to decide is whether they should be punished for reading the law.

The Tax Court, after reading the *tax law* presented in the Sherwoods' briefs labelled it "legalistic gibberish." We agree. The Tax Court also labelled the Sherwoods "tax protesters." We disagree. The Tax Court's assessment of a $5,000 penalty against the Sherwoods for wasting the Court's time and resources is clearly an abuse of discretion based on its attitude toward any

individual it perceives as a "tax protester" regardless of the merit of that individual's position.

The penalties sustained under 6662(a) of nearly $2,000 were claimed by the Tax Court to be due to negligence per 26 U.S.C. 6662(b)(1). Negligence? Balderdash!

The record in this case makes it clear that the Sherwoods spent a great deal of time and energy in their efforts to understand and comply with Title 26. They simply cannot determine, and the Commissioner refuses to state *which provisions of Title 26 they are to comply with.* The Tax Court failed to state *which* rules or regulations the Sherwoods carelessly, recklessly or intentionally disregarded, just as the Commissioner failed to state which statute and regulation mandate the tax liability she asserts on the Sherwoods.

It would appear that, while the Tax Court would very much have liked to sustain the assertions of the Commissioner, it was unable to sustain the $7,000 in penalties asserted for civil fraud. It was able to accomplish the same result, however, by applying the label of "tax protester" and claiming discretion in assessing other penalties in the same amount.

So, in the final analysis, if any one's time and resources were wasted, it was the Sherwoods'. Although they received the relief for the Commissioner's asserted fraud penalty, it was summarily undone by the bias of the Court.

On top of that, the Court of Appeals had the nerve to claim that the Tax Court was *lenient* with the Sherwoods. Excuse me, your Honors, your bias is showing.

If this ruling is allowed to stand, we will be left with the regrettable conclusion in violation of every American citizen's rights that ignorance of the law is no excuse, whereas knowledge of the law is a punishable offense.

V. The assessment of penalties against the Sherwoods by the Tax Court and the Court of Appeals constitutes an infringement of their Constitutionally guaranteed right to petition their government for a redress of grievances.

In refusing to rule on the merits of their case, the Tax Court and the Court of Appeals violated the Sherwoods right to

due process. By assessing penalties for bringing "frivolous" cases, they are attempting to prevent "tax protesters" in general and the Sherwoods, in particular, from petitioning their government for a redress of grievances, or punishing them for so doing, in violation of their rights guaranteed by the First Amendment to the Constitution.

The Commissioner and the Courts may not like the fact that the Sherwoods filed the forms which they filed or the fact that the Commissioner was unable to provide evidence that there was anything illegal, invalid or otherwise wrong with those filings. But depriving the Sherwoods of their property as punishment for bringing the issues to their attention is unconscionable.

The Commissioner may want everyone to believe that actually reading and trying to understand the law the IRS is charged with enforcing is some sort of criminal or otherwise despicable activity. Certainly the Commissioner would like the Courts to believe that. The Tax Court clearly wanted to punish the Sherwoods for their audacity in doing just that. It also hoped to discourage an appeal to the Court of Appeals by applying the "tax protester" label.

The Sherwoods felt compelled to appeal the Tax Court's decision because of what they believed was a gross abuse of the Tax Court's discretion, and because it did not rule on the merits of their case. For the Court of Appeals to award damages after itself refusing to rule on the merits and distorting the Sherwoods' arguments is not only adding insult to injury, but is clearly designed to discourage them from appealing to this Court.

None of the actions in this matter would have been brought before the Courts if the IRS had simply answered the Sherwoods' basic questions about which particular tax they were liable for, what is the statutory and regulatory authority for the tax, and what form they are required to file, since, after diligent search and thorough review of the law and regulations the Sherwoods were unable to find the answers to those questions. If the Courts' time is being wasted with actions of this type, it is the fault of the Legislature for promulgating in the Internal Revenue Code a law which on its face should be void for vagueness. In the Sherwoods' case, it is the IRS which has wasted the resources of the Courts by steadfastly refusing to provide any substantive basis for their

position or their actions, thereby forcing the Sherwoods to go to the Courts for resolution. And even in the face of bias, injustice and the nearly legendary might of the IRS, the Sherwoods have felt that they must persist in presenting the truth in the fervent hope that justice is still available in America.

26 U.S.C. 6673(a)(1)(b) is a law passed by Congress which abridges the Sherwoods' right to petition their Government for a redress of grievances in violation of their rights guaranteed by the First Amendment to the Constitution. And, while Federal Rules of Appellate Procedure Rule 38, under which the Court of Appeals issued penalties against the Sherwoods is not a law passed by the Congress, the Court of Appeals erred in affirming the penalties assessed under an unconstitutional law.

The penalties asserted against the Sherwoods for bringing a frivolous case and appeal should be reversed.

CONCLUSION

This is a relatively small case in the overall scheme of things. The $40,000 the IRS has attempted to extort from the Sherwoods is insignificant compared to the national debt. The emotional distress they have suffered is undoubtedly small compared to that of a person facing capital punishment. But the consequences of this case are staggering. The abusive nature of the IRS is so pervasive that it is accepted as a way of life for countless Americans. Congress at this very moment is struggling with measures to effect its reform.

But this case is not about taxes or the IRS. It is about the Judiciary. For the acts of Congress to curb the abuses by the IRS of this country's laws and citizens will be meaningless if the Judiciary is partner to those abuses by failing to hold the IRS accountable under the law. If the widespread, though we pray erroneous, belief that the Internal Revenue Service is indeed above the law thus turns out to be true, then the free America which we have so dearly loved is no more.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-60476
Summary Calendar

U.S. COURT OF APPEALS
FILED
FEB 26 1998
CHARLES R. FULBRUGE III
CLERK

STEPHEN P. SHERWOOD;
SHARON L. SHERWOOD,

Petitioners – Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent – Appellee

On Appeal from the Decision of the
United States Tax Court
(16795-95)

Before JOLLY, BENAVIDES, and PARKER, Circuit Judges.
PER CURIAM: *

In this tax protester case, Stephen P. Sherwood and Sharon L. Sherwood object on multitudinous grounds to the tax court's determination of deficiencies, additions to tax, and penalties for the tax years 1991, 1992, and 1993. After a thorough

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* Pursuant to 5TH Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH Cir. R. 47.5.4.

review of the record and a close study of the briefs, we conclude that the Sherwoods arguments are all without merit. Indeed, they are frivolous.

Among the Sherwoods' complaints are the contentions that the tax court lacked jurisdiction, that it erred in sustaining the Commissioner of Internal Revenue's assessment of deficiencies, additions to tax and penalties, and that it abused its discretion in declaring sua sponte penalties for advocating a frivolous position.

The Sherwoods' jurisdictional complaint and most of their argument on the merits are tied to a belief that they are citizens of the State of Texas, not the United States. For this reason, they conclude that they are (1) not subject to most taxes and (2) permitted to file Form 1040-NR (non-resident). As there is obviously no validity to the Sherwoods' concept of citizenship, the arguments based upon it are frivolous.

The remainder of the Sherwoods' argument on the merits revolves around the contention that they owed no taxes for wages because the labor performed balanced the wage received, resulting in no net income. As it is unfortunately and manifestly not so, there is no merit to this argument either.

The Sherwoods' final contention is that the district court abused its discretion in assessing a $2500 penalty against each of them for advancing the wage argument just discussed. I.R.C. § 6673(a) expressly empowers the tax court to assess such a penalty for advancing a frivolous position, however, and it cannot be said that the court abused its discretion in doing so in this case. Indeed, in the light of the fact that § 6673(a) allows for a penalty for up to $25,000, we are only surprised that the tax court was so restrained.

For these reasons and those expressed in the tax court's careful and patient opinion, its judgement is AFFIRMED. Furthermore, because this appeal was utterly frivolous, it is also ORDERED that the Sherwoods show cause within ten days time why reasonable attorney's fees and double costs should not be awarded to the Commissioner of Internal Revenue as damages, pursuant to Fed. R. App. P. 38.

AFFIRMED.

APPENDIX B

T.C. Memo. 1997 – 26

UNITED STATES TAX COURT

STEPHEN P. AND SHARON L. SHERWOOD, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 16795-95. Filed January 15, 1997.

Stephen P. Sherwood, pro se.

Franklin R. Hise, for respondent.

MEMORANDUM OPINION

DINAN, Special Trial Judge: This case was heard pursuant to the provisions of section 7443A(b)(3) and Rules 180, 181, and 182.[1]

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the taxable years in issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

SERVED JAN 15 1997

Respondent determined deficiencies in petitioners' Federal income taxes, additions to tax, and penalties for the years 1991, 1992, and 1993 as follows:

Petitioner husband:

		Additions to Tax		Penalty
Year	Deficiency	Sec. 6651(a)(1)	Sec. 6651(f)	Sec. 6663(a)
1991	$4,718	$100	--	$3,538
1992	5,419	--	$430	--
1993	4,707	--	124	--

Petitioner wife:

		Additions to Tax		Penalty
Year	Deficiency	Sec. 6651(a)(1)	Sec. 6651(f)	Sec. 6663(a)
1991	$4,713	$100	--	$3,535
1992	5,394	--	$411	--
1993	4,707	--	124	--

The issues for decision are: (1) Whether petitioners failed to report income in amounts determined by respondent for the years 1991, 1992, and 1993; (2) whether petitioners are liable for the section 6651(a)(1) addition to tax for 1991; (3) whether petitioners are liable for the section 6651(f) additions to tax for 1992 and 1993 for failure to file due to willful intent to evade income taxes; (4) whether, in the event it is decided that the failure to timely file was not due to willful intent to evade income taxes, petitioners are liable for the delinquency penalty under section 6651(a)(1) for 1992 and 1993; (5) whether petitioners are liable for the section 6663(a) fraud penalty for 1991; and (6) whether, in the event it is decided the underpayment for 1991 was not due to fraud, petitioners are liable for the accuracy-related penalty under section 6662.

Some of the facts have been stipulated and are so found. The stipulations of fact and attached exhibits are incorporated herein by this reference. Petitioners resided in Round Rock, Texas on the date the petition was filed in this case.

Since the time they were married in 1962 and until the years here in issue, petitioners had filed joint Federal income tax returns and paid tax on their community income. As a result of

conversations with friends and their own limited research in constitutional and tax law, petitioners concluded that they were not citizens of the United States and were not therefore subject to the tax laws applicable to United States citizens. Relying upon this conclusion, petitioners each filed Forms 1040-NR as non-resident aliens for the tax years at issue, since Form 1040-NR requires the filing of separate returns for married couples. Separate deficiency notices were issued by respondent to each petitioner.

The first issue for decision is whether petitioners failed to report income in an amount determined by respondent.

The determinations of respondent in the statutory notice of deficiency are presumed to be correct, and petitioners bear the burden of proving that respondent erred in her determinations. Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933).

Section 61(a) includes as gross income all income from whatever source derived including, but not limited to, compensations for services and interest. Sec. 61(a)(1), (4). At trial, petitioner husband acknowledged the receipt of all items of unreported income determined by respondent for the tax years at issue. In doing so, it became apparent that petitioners' erroneous interpretations of the Internal Revenue Code and claim of foreign citizenship were the only arguments which they were interested in presenting.

We will not address petitioners' tax-protester ramblings which were presented at trial. As was stated by the Court of Appeals for the Fifth Circuit, "We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." Crain v. Commissioner, 737 F.2d 1417, 1417 (5th Cir. 1984).

Since petitioners have presented no meritorious arguments disputing respondent's proposed deficiencies, we sustain respondent's determinations of deficiencies in petitioners' 1991, 1992, and 1993 Federal income taxes.

The second issue for decision is whether petitioners are liable for the section 6651(a)(1) addition to tax for 1991. Section 6651(a)(1) provides for an addition to tax of 5 percent of the tax required to be shown on the return for each month or

fraction thereof for which there is a failure to file a return, up to 25 percent in the aggregate. The addition to tax is imposed on the net amount due, calculated by reducing the amount required to be shown as tax on the return by any part of the tax which is paid on or before the date prescribed for payment of the tax. Sec. 6651(b)(1) The flush language of section 6651(a) provides that in the case of a failure to file within 60 days of the date prescribed for the filing of such return, unless it is shown that such failure is due to reasonable cause and not due ~~to~~ willful neglect, the addition to tax under section 6651(a)(1) shall not be less than the lesser of $100 or 100 percent of the amount required to be shown as tax on such return. See Patronik-holder v. Commissioner, 100 T.C. 374, 379-381 (1993).

Petitioners bear the burden of proving that respondent's determinations that they were negligent are incorrect. Rule 142(a); Cluck v. Commissioner, 105 T.C. 324, 339 (1995). Petitioners' 1991 Federal income tax returns were due on April 15, 1992. Petitioners have not offered any evidence to show that their delay in filing their 1991 return was due to reasonable cause rather than their willful neglect. Accordingly, respondent's determinations that petitioners are each liable for a $100 addition to tax under section 6651(a)(1) are sustained.

The third and fourth issues for decision are whether petitioners are liable for the section 6651(f) addition to tax for 1992 and 1993. Respondent determined in the alternative that the section 6651(a)(1) addition to tax would apply in the event it was decided that the failure to file was not fraudulent. As noted infra, respondent bears the burden of proving fraud issues by clear and convincing evidence. Section 7454(a); Rule 142(b).

Section 6651(f) provides that the section 6651(a)(1) addition to tax shall be increased to 15 percent of the tax required to be shown on the return for each month or fraction thereof for which there is a failure to file a return, up to 75 percent in the aggregate, where such failure to file is fraudulent.

It would be repetitive to discuss the reasons why we are unconvinced that petitioners acted fraudulently in failing to file their 1992 and 1993 returns as the reasons enumerated infra in regard top the 1991 fraud penalty are similarly relevant for these taxable years. However, we must still address respondent's

alternative determination that petitioners are liable for the section 6651(a)(1) addition to tax for 1992 and 1993.

Irrespective of the fact that respondent has taken an inconsistent position with regard to petitioners' Forms 1040-NR, [2] respondent's determinations that petitioners failed to file sufficient tax returns are presumed to be correct and petitioners bear the burden of proving her determinations erroneous. Rule 142(a); Cluck v. Commissioner, supra at 339.

Section 6011(a) requires all taxpayers to make a return or statement according to the forms and regulations prescribed by the Secretary. A document constitutes a valid return if it contains sufficient data from which respondent can compute and assess a tax liability. McCaskill v. Commissioner, 77 T.C. 689, 696-697 (1981).

Respondent's position is that petitioners' submitted Forms 1040-NR for 1992 and 1993 do not constitute valid income tax returns. We agree with respondent. Petitioners have not proven that the Forms 1040-NR sufficiently listed items of gross income, deductions or calculations of taxes by which their proper tax liability could be ascertained. The attachment of Forms W-2 does not substitute for information required to be shown on the returns. See Beard v. Commissioner, 82 T.C. 766, 779 (1984).

As was the case with their failure to file a timely return for 1991, petitioners have not shown that such failure was due to reasonable cause. Therefore, respondent's determinations that petitioners are liable for the section 6651(a)(1) addition to tax for 1992 and 1993 are sustained.

The fifth issue for decision is whether petitioners are liable for the section 6663(a) fraud penalty for 1991. In her deficiency notice, respondent determined that the section 6662(a) accuracy-related penalty would apply in the event it was decided that the underpayment was not due to fraud. A prerequisite to the applicability of sections 6662 and 6663 is that a return of tax, other than one prepared by respondent pursuant to section

---

[2] For 1991, respondent accepted petitioners' Forms 1040-NR as a filing of a return. However, for 1992 and 1993, respondent determined that these Forms 1040-NR did not constitute a filing.

6020(b), is filed. Sec. 6664(b); Clayton v. Commissioner, 102 T.C. 632, 652-653 (1994).

Section 6663(b) provides that if respondent establishes that any part of any underpayment of tax required to be shown on a return is due to fraud, the entire underpayment is treated as attributable to fraud and subjected to a 75-percent penalty unless the taxpayer establishes that some part of the underpayment is not attributable to fraud. Respondent bears the burden to prove by clear and convincing evidence an underpayment for each year and that some part of the underpayment for each year was due to fraud. Section 7454(a); Rule 142(b); Clayton v. Commissioner, supra at 646.

Fraud is established by proving that a taxpayer intended to evade tax believed to be owing by conduct intended to conceal, mislead, or otherwise prevent the collection of such tax. Clayton v. Commissioner, supra at 647. Direct evidence of the requisite fraudulent intent is seldom available, but fraud may be proved by examining circumstantial evidence indicative of the taxpayer's motives. Recklitis v. Commissioner, 91 T.C. 874, 910 (1988). Over the years, courts have developed various factors, or "badges", which tend to establish the existence of fraud. See Clayton v. Commissioner, supra at 647.

Respondent argues that petitioners were fully aware of their obligation to pay Federal income tax on their income for the years at issue since they paid tax on the same type of income in previous years. Respondent contends that petitioners' underpayment for 1991 is attributable to a fraudulent procurement of a refund of withheld taxes. Respondent further asserts that petitioners' omission of Social Security numbers on the submitted Forms 1040-NR was intended to mislead respondent.

We find that the badges of fraud are not sufficiently present in the facts of this case. First, petitioners filed what they believed, albeit erroneously, to be the proper forms. We note that respondent accepted these forms as a valid filing and continues to rely upon such acceptance as a basis for the section 6651(a) failure to file addition to tax for 1991. Second, petitioner husband did not attempt to stop the withholding of taxes from his paychecks. Third, petitioner husband's omission of his Social Security number from his Form 1040-NR does not amount to

concealment since it was listed on his submitted Form W-2. If his intent was to conceal this information, he would not have disclosed it to respondent in this way. We recognize that, absent respondent's acceptance of this Form 1040-NR, the mere attachment of a Form W-2 would not remedy a form which was otherwise invalid for lack of sufficient information by which tax liability could be calculated. Beard v. Commissioner, supra at 779. However, noncompliance does not amount to concealment on these facts. Fourth, petitioners maintained continuous correspondence with respondent in regard to their case. The facts do not clearly show that petitioners intended to mislead respondent or conceal their tax liability. Rather, the facts show that they erroneously believed that they did not owe any tax. As this Court has previously stated, these types of arguments "may have been meritless, frivolous, wrongheaded, and even stupid, but we cannot hold that they amounted to fraud without something more. Were we to do so, every [tax] protester case would be automatically converted into a fraud case." Kotmair v. Commissioner, 86 T.C. 1253, 1262 (1986). We will, however, address below the consequences of pursuing such erroneous beliefs before this Court.

The sixth issue for decision is whether petitioners are liable in the alternative for the section 6662(a) accuracy-related penalty for 1991. Respondent's determinations are presumed to be correct, and petitioners bear the burden of proving that the penalties do not apply. Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933); Bixby v. Commissioner, 58 T.C. 757, 791-792 (1972).

Section 6662(a) imposes a 20-percent penalty on the portion of the underpayment attributable to any one of various factors, one of which is negligence or disregard of rules or regulations. "Negligence" includes a failure to make a reasonable attempt to comply with the provisions of the Internal Revenue laws or to exercise ordinary and reasonable care in the preparation of a tax return. Sec. 6662(c); sec. 1.6662-3(b)(1), Income Tax Regs. "Disregard" includes any careless, reckless, or intentional disregard of rules or regulations. Sec. 6662(c); sec. 1.6662-3(b)(2), Income Tax Regs.

We find that petitioners have failed to prove that they were not negligent in their underpayment of tax. Although petitioners blame respondent for their lack of knowledge, the rules and regulations concerning their proper tax liability are readily available to the public through various sources. Therefore, we hold that petitioners are liable for the section 6662(a) accuracy-related penalty for 1991.

We will next determine whether this Court should impose sanctions upon petitioners pursuant to section 6673.

Whenever it appears to this Court that the taxpayer's position in a proceeding before it is frivolous or groundless the Court, in its discretion, may require the taxpayer to pay to the United States a penalty not in excess of $25,000. Sec. 6673(a)(1)(B). A proceeding in the Tax Court is frivolous "if it is contrary to established law and unsupported by a reasoned colorable argument for a change in the law." Coleman v. Commissioner, 791 F.2d 68, 71 (7th Cir. 1986). Sanctions are properly imposed when the taxpayer knew or should have known that his claim or argument was frivolous. Hansen v. Commissioner, 820 F.2d 1464, 1470 (9th Cir. 1987).

In response to the Court's questions the following evidence was introduced at trial:

(The Court)	Q Are you aware of the provisions of section 6673 of the Internal Revenue Code, the damages provision?
(Petitioner)	A I am.
(The Court)	Q And are you aware of the many cases that have addressed themselves to various and sundry tax protestor arguments?
(Petitioner)	A Your Honor, [respondent's] Counsel has stated that I am a tax protestor, which is a conclusion that has yet to be proved.

After painstakingly listening to petitioners' groundless arguments at trial and reading through the same in their briefs, we conclude that petitioners are indeed tax protesters. Petitioners' arguments include tax protester rhetoric and legalistic gibberish, which they should have known are frivolous under established

law. Petitioners' frivolous "position" (within the meaning of section 6673(a)(1)(B)) is that wages are immune from tax.

In view of the foregoing we will sua sponte exercise our discretion under section 6673(a)(1)(B) and require each petitioner to pay a penalty to the United States in the amount of $2,500.

To reflect the foregoing,

Decision will be entered Under Rule 155.

APPENDIX C

UNITED STATES TAX COURT

STEPHEN P. and SHARON L. SHERWOOD,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No.
	)	16795-95
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent,	)	

DECISION

Pursuant to the opinion of the Court filed January 15, 1997, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income tax due from petitioner-husband for the taxable years 1991, 1992 and 1993 in the amounts of $4,718.00, $5,419.00 and $4,707.00, respectively;

That there are deficiencies in income tax due from petitioner-wife for the taxable years 1991, 1992 and 1993 in the amounts of $4,713.00, $5,419.00 and $4,707.00, respectively;

That there are additions to tax due from petitioner-husband for the taxable years 1991, 1992 and 1993, under provisions of I.R.C. § 6651(a)(1), in the amounts of $100.00, $143.00 and $100.00, respectively;

That there are additions to tax due from petitioner-wife for the taxable years 1991, 1992 and 1993, under provisions of I.R.C. § 6651(a)(1), in the amounts of $100.00, $137.00 and $100.00, respectively;

That there are now additions to tax due from petitioners for the taxable years 1992 and 1993, under the provisions of I.R.C. § 6651(f);

That there is a penalty due from petitioner-husband for the taxable year 1991, under the provisions of I.R.C. § 6662(a), in the amount of $944.00;

That there is a penalty due from petitioner-wife for the taxable year 1991, under the provisions of I.R.C. § 6662(a), in the amount of $943.00;

That there is no penalty due from petitioners for the taxable year 1991, under the provisions of I.R.C. § 6663(a);

That there is a penalty due from petitioner-husband for the taxable year 1991, under the provisions of I.R.C. § 6673(a)(1), in the amount of $2,500; and

That there is a penalty due from petitioner-wife for the taxable year 1991, under the provisions of I.R.C. § 6673(a)(1), in the amount of $2,500.

"s/Daniel J. Dinan"

Entered April 11, 1997.

* * * * *

APPENDIX D

EXCERPTS FROM PETITIONERS' BRIEF TO THE TAX COURT

"Who is a citizen. Every person born or naturalized in the United States and ***subject to its jurisdiction*** is a citizen."[emphasis added] There are two classes of citizens: one which is subject to the jurisdiction of the United States and one which is not.

A citizen "subject to the jurisdiction" of the United States, however, receives his citizenship directly from the United States government via the 14th Amendment to the Constitution.

These decisions were supported by the Supreme Court's ruling that the income tax is an "excise" tax. This was also supported by the Congress.

> "[T]he conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such ..." - *Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1916)*

> "The income tax is, therefore, not a tax on income as such. It is an excise tax with respect to certain activities and privileges which is measured by reference to the income which they produce. The income is not the subject of the tax; it is the basis for determining the amount of tax." - *House Congressional Record, March 27, 1943, pg. 2580*

An excise tax must, of necessity, attach to a licensable enterprise, or to a privilege. 14th Amendment citizens certainly obtain a privilege (citizenship) from the United States, so an excise tax is appropriate for those individuals, but when a state citizen exchanges his or her labor for money by engaging in an occupation of common right, there is no gain or "income" as defined by the courts.

EXCERPTS FROM PETITIONERS' BRIEF TO THE COURT OF APPEALS

STATEMENT OF ISSUES

I. Whether a valid determination of deficiency was made by the Commissioner.

II. Whether the presiding Special Trial Judge had authority to hear and decide this case.

III. Whether the Tax Court erred in sustaining penalties under 26 U.S.C. 6651(a)(1) for 1991, 1992 and 1993.

IV. Whether the Tax Court showed undue prejudice in sustaining penalties under 26 U.S.C. 6662(c) for 1991.

V. Whether the Tax Court abused its discretion in assessing, sua sponte, penalties under 26 U.S.C. 6673(a)(1).

The Court should affirm the Sherwoods' motion to dismiss for lack of jurisdiction. The Sherwoods filed valid income tax returns for 1991 on Form 1040NR. The commissioner accepted those returns as valid filings (*T.C. Memo 1997-26* at 5). The Ninth Circuit Court of Appeals ruled in *Scar v. Commissioner*, 814 F.2d 1363, (1987) that failure to comply with statutory requirements renders a deficiency notice null and void and leaves nothing on which Tax Court jurisdiction can rest. This case differs from *Scar* in that, in *Scar*, the IRS admitted it did not have a return upon which it based its notice of deficiency. In this case the Commissioner admits to having had valid returns for 1991 but blatantly disregarded them.